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POLICY RULEMAKING PROCESS WITHIN THE EXECUTIVE BRANCH OF GOVERNMENT: AN ANALYSIS OF THE BRAZILIAN PRESIDENTIAL DECREES.

O PROCESSO DE CONSTRUÇÃO JURÍDICA DAS POLÍTICAS PÚBLICAS DENTRO DO PODER EXECUTIVO: UMA ANÁLISE DOS DECRETOS PRESIDENCIAIS BRASILEIROS.

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SUMMARY: 1. Introduction. 2. Theoretical Framework; 2.1. International context. 2.2. Brazilian context. 3. Method. 4. Results. 4.1. Structural Dimension (Legal Framework). 4.2. Craft Dimension (Managerial Framework). 4.3. Cultural Dimension. 5. Conclusion. References.

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ABSTRACT: This article analyzes whether the Presidential Decrees complied with better regulation standards and results are explained in the light of the legal, managerial and cultural dimensions of the Public Administration. 128 Decrees, issued between 2009 and 2018, which institutionalize public policies or government programs are evaluated. These quantitative data were combined with the information obtained from 66 interviews with top-ranked public managers and lawyers. These results evidence a reduced compliance with better regulation practices and set the hypothesis that this institutional trajectory is going to be sustained due to an observed mismatch between the current values and practices with the underlying assumptions of the better regulation reforms.

KEYWORDS: Rulemaking. Better Begulation. Public Policy. Decision Process. Administrative Law

RESUMO: Este artigo analisa se os Decretos Presidenciais observam os critérios de melhoria da regulação e seus resultados são explicados a luz da dimensão legal, gerencial e cultural da Administração Pública. São avaliados 128 Decretos, editados entre os anos 2009 e 2018, que institucionalizam políticas públicas ou programas governamentais. Estes dados quantitativos são combinados com as informações de 66 entrevistas realizadas com gestores e advogados públicos de alto escalão. Os resultados evidenciam uma reduzida conformidade com as melhores práticas regulatórias e apontam para a hipótese de que essa trajetória institucional será mantida devido ao enraizamento de valores e práticas atuais que não coadunam com os pressupostos subjacentes as reformas de melhoria da regulação.

PALAVRAS-CHAVE: Legística. Regulação. Políticas Públicas. Processo de Decisão. Direito Administrativo

1. INTRODUCTION

To what extent does the policy regulation process, through Presidential Decrees (Brazilian equivalent of the North American Executive Order), observe the better policy regulation practices? What explains its results? The international literature dedicated to policy rulemaking is rich in analysis about how bureaucratic procedures can impact policy performance (WEST, 2004; 2009; YACKEE; YACKEE, 2010; BOLTON; POTER; THROWER, 2016; DUNLOP; RADAELLI, 2017; POTTER, 2019). Recently, studies about better regulation practices in the regulatory agencies have also gained a growing attention of academics and professionals in Brazil (VALENTE, 2013; CASTRO, 2014; PECI, 2016).

Traditional Brazilian research on rulemaking focuses on the quality of the decision-making process that occurs within the legislative branch of government (ALMG, 2009; SOARES, KAITEL; PRETE, 2019). Meanwhile, on the executive branch, studies have been largely dedicated to regulatory agencies (PACHECO, 2006; PÓ; ABRÚCIO, 2006; RAMALHO, 2009; RAGAZZO, 2018). Hence, there is a perceptible lack of knowledge regarding the study of the Brazilian ministries and the Presidency Cabinet's contribution to the policy rulemaking process and their relevant role in implementing better policy rulemaking practices within the executive branch of government (LASSANCE, 2015).

For more than four decades, foreign countries with parliamentary and presidential systems have been developing their own right-fit systems of Regulatory Impact Assessment (RIA), and their results for both regulatory agencies and ministerial offices seem to converge to a significant improvement in the quality of public policy decision-making. Now, after thirty years of a democratic regime, the opportunity has arrived to assess the quality of the policy rulemaking process within the Brazilian federal executive branch of government and develop right-fit strategies to overcome their challenges.

To properly inform future reforms, this research proceeded with an assessment of the ministerial, legal, and merit opinions of a sample of 128 presidential decrees that regulated public policies or governmental programs, enacted between the years 2009 and 2018. Results were then analysed through the three dimensions of Public Administration, as proposed by Hill and Lynn (2009). The following sections aimed to summarize the better regulation approach, detail the research design, describe the main quantitative results, explain them through qualitative data and address final remarks regarding implication for future reforms.

2. THEORETICAL FRAMEWORK

The Regulatory Impact Assessment (RIA) is a method of policy analysis, which is intended to assist the policymakers in the design, implementation, and monitoring of improvements to regulatory systems, by providing a tool for assessing the likely consequences of the proposed regulation and actual consequences of existing ones (KIRKPATRICK; PARKER, 2007). RIA is an instrument for public management reform that strengthens evidence-based policymaking. Its procedures boost a rational approach for policy formulation by assessing both the regulation's process (principles of good governance) and its outcomes (ex-ante or ex-post evaluation of policy goals). In democratic regimes, RIA is a tool for increasing transparency, accountability, and rationality in the decision-making process improving the overall regulatory quality. According to the United Kingdom National Audit Office (NAO, 2001, p.2), the purpose of RIA is:

> To explain the objectives of the proposal, the risks to be addressed and the options for delivering the objectives. In doing so it should make transparent the expected costs and benefits of the options for the different bodies involved, such as other parts of government and small business, and how compliance with regulatory options would be secured and enforced.

This process begins with a demand for public policy (KERWIN; FURLONG, 2019). Then, RIA unfolds in a series of tasks such as i) a detailed description of policy problem and objectives; ii) analysis of policy alternatives for achieving the objectives; iii) assessment of impacts, including a cost/benefit analysis; iv) consultation process with stakeholders (citizens, business, etc.); v) fully reasoned recommendation (KIRKIPATRICK; PARKER, 2007). This process should be guided by democratic principles that emphasize the achievement of high policy performance.

As the regulatory role of the government has grown in recent years, better policy regulation has become an object of great interest in our time (MORAN, 2002). Since 1995, the Organisation for Economic Co-operation and Development (OECD) has been disseminating and promoting guiding principles for regulatory quality and performance. The OECD Recommendations established that good regulation should: i) have clearly identified policy goals, and be effective in achieving those goals; ii) have a sound legal and empirical basis; iii) produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental, and social effects into account; iv) minimize costs and

market distortions; v) promote innovation through market incentives and goal-based approaches; vi) be clear, simple, and practical for users; vii) be consistent with other regulations and policies; and viii) be compatible with market competition, trade and investment, facilitating principles at domestic and international levels (OECD, 1995). According to the OECD (2004, p.8):

> Regulatory quality refers to the extent to which a regulatory system pursues its underlying objectives. These objectives involve the specific policy objectives, and which regulatory tool is being employed to pursue the efficiency with which these objectives are achieved, as well as governance-based objectives including transparency and accountability.

Moreover, OECD puts emphasis on regulation compliance strategies that help to improve the general welfare of citizens by providing superior protection from hazards, efficient government services, and lower costs for business. Its recommendations were the first international instrument to address regulatory policy, management, and governance as a whole-of-government activity that should be addressed by sectoral ministries, regulatory and competition agencies. The OECD principles and guidelines for promoting better policy regulation are well established in an increasing number of publications (OECD, 1995; 1997; 2004; 2008a; 2009; 2012; 2015; 2020).

2.1. INTERNATIONAL CONTEXT

Policy rulemaking governance became part of the developed countries' policy agenda from the 1970s onwards. The creation of the European Union strengthened Europe's need for a rational public administration grounded on planning, with the adoption of governmental measures of efficiency that improve the Welfare State. In the liberal Anglo-Saxon tradition, such as the United Kingdom, the United States, and Canada, the better regulation practices were developed mainly as a tool for the promotion of economic efficiency. For both, new practices served to improve the quality of their economic, social, and administrative policy regulations (OECD, 2008a).

The United States was the pioneer of the Regulatory Impact Analysis (RIA). Since the adoption of the Executive Order n° 12.291/81, all U.S. government agencies submit the most important policy rules to a cost-benefit evaluation before its approval. The aim is to reduce the burden of regulation, increase accountability, promote better agency performance, and improve the overall quality of policy decisions. According to Executive

Order n° 12.866/93, the Office of Management and Budget (OMB) is responsible for assessing and reviewing the assessments carried out by governmental agencies.

In the United Kingdom, RIA started with Thatcher's government to cut the regulatory burden on business. In 1997, the deregulation approach gave way to better regulation initiatives that emphasized the improvement of the regulation quality for the whole society. The 2001 reform required that all regulatory agencies, as well as specialized government departments, should conduct RIA. In 2005, this decentralized structure was replaced by a centralized unit located in the Prime Minister's Office (Better Regulation Executive). Another body in this arrangement is the National Audit Office (NAO), which plays a key role in assessing the quality of the regulatory activity. Since 2007, the United Kingdom's experience has been a paradigm, showing the importance of constant investment in learning and institutional development. Since 2007, all policy decision-making is conducted according to the RIA procedures.

In 2001, the European Union created a High-Level Consultative Group to formulate a strategy for improving the quality of regulation - legislation and regulation at the community and local level - called the Mandelkern Group. At the time, a report was prepared to propose measures for a good regulation: a) adoption of the impact assessment (ex-ante and ex-post); b) analysis and evaluation of alternatives to public policies; c) public consultations; d) simplification of the policy formulation process; e) publicizing access to legislation and regulation; f) establishment of an effective regulatory structure that includes a quality control unit (MANDELKERN GROUP, 2001). In the European Union, policies and programs about environmental, economic, or social issues are preceded by an RIA, as well as spending programs and international negotiations. The body responsible for conducting RIAs is the Impact Assessment Board (IAB), which is directly linked to the President of the European Commission. The Lisbon agenda has openly supported the adoption of RIA initiatives as an essential tool for recovering the competitiveness of the European economy.

Recently, international efforts to improve the quality of the general rulemaking process have crossed borders and their principles and practices have reached developing countries like Brazil (PECI; SOBRAL, 2011; OECD, 2008B). Since then, a rich literature has evolved to explain the diffusion of RIA around the globe (RADAELLI, 2005; RODRIGO, 2005).

2.2. BRAZILIAN CONTEXT

In 1991, the first edition of the Presidency of the Republic's Writing Manual started to establish formal procedures for improving the quality of legal acts. The second part of this manual provides notes on the legislative techniques for executive branch normative acts (FAILLACE NETO, 2007). In 1992, Decree nº468/92 was enacted (BRASIL, 1992). Then, for the first time, standards were formally established for the draft of legal acts within the executive branch and guidelines provided for the processing of legal acts subject to presidential approval. In 1996, an updated version of this document was enacted by Decree 1,937/96 (BRASIL, 1996). Finally, in 1998, the National Congress issued the Complementary Law nº95/98, to regulate the topic in accordance with the sole paragraph of art. 59 of the Federal Constitution (PIRES, 2009).

In 2002, new rulemaking standards were approved by Decree n° 4.176/02. That new framework established principles and rules set out in the Complementary Law, describing aspects of legal and substantive policy regulation that should be observed by rule-makers inside the Brazilian federal executive branch of government. An analytical checklist was added at its Annex. These orientations were slightly changed in 2017, by Decree n° 9.191/17, which altered the rules and guidelines for drafting, amending, consolidating, and sending proposals of policy rulemaking for presidential approval (BRASIL, 2017a). This new orientation was accompanied by Decree 9.203/17, which established general principles for public governance, underlining the importance of continuous policy rulemaking quality and improvement (BRASIL, 2017b).

For enhancing the rulemaking capacities of Brazilian regulatory agencies, the federal government created the Program for Strengthening Institutional Capacity for Management in Regulation (PRO-REG), enacted through Decree n° 6.062/07, amended by Decree n° 8.760/16 (BRASIL, 2007; BRASIL, 2016). The goal of PRO-REG was to improve the quality of regulation within the Brazilian regulatory agencies by strengthening its regulatory systems, in order to facilitate the full exercise of functions by all actors and to improve coordination among participating institutions, mechanisms of accountability, participation, and monitoring by civil society (BRASIL, 2018).

In 2018, the Brazilian federal government published, within the PRO-REG initiative, the General Guidelines and Guidance for the preparation of Regulatory Impact Analysis – RIA. These documents were formulated

by the Sub-office of Government Policies Analysis and Monitoring of the Presidency (SAG/CC) in partnership with federal regulatory agencies. In the beginning, it is said that the main objective of the guidelines is to improve regulatory agencies' capacities, but they can "be perfectly applied by any other institution that acts with the potential to change rights or create obligations to third parties" (BRASIL, 2018). Recently, Law nº 13.874/2019 (Declaration of Economic Freedom Rights) and Law nº13.848/2019 (On the management, decision-making, and social control of regulatory agencies) established that proposals for editing and alteration of legal acts of interest by economic agents or the public services users' will be preceded by an RIA (BRASIL, 2019a; BRASIL, 2019b). This record evidences that every newly elected presidency enacted a legal reform on the policy rulemaking process. Therefore, on to the following research question: what was the technical improvement of the policy rulemaking after the establishment of this legalistic better regulation framework?

3. METHOD

To better assess the results of this policy rulemaking framework, research adopted a quali-quanti mix-method strategy. Firstly, a sample of 128 Presidential Decrees, enacted between 2009 and 2018, with substantive policy content (related to decision making of public policies or governmental programs) were analyzed. Those Decrees were assessed according to the good rulemaking criteria established by Annex I, of Decree n°4.176/02, in effect until February 1st, 2018 (BRASIL, 2002). The construction of the sample began with a search for Presidential Decrees on the website (Portal da Legislação).[2] The purpose of this procedure was to identify all enacted decrees that regulated public policies or governmental programs between 2009 and 2018. Once identified, legal and merit opinions issued by SAG/CC (Sub-office of Government Policies Analysis and Monitoring of the Presidency) and SAJ/CC (Sub-office of Legal Affairs of the Presidency), besides the original ministerial opinion, were requested through the federal government information access system.[3]

This procedure resulted in a sample of 128 Decrees, enacted between 2008 and 2018, with substantive policy content. This sample should have resulted in 384 documents (one legal, one merit, and at least one ministerial opinion for each of the 128 decrees in the sample). However, only 112 ministerial opinions (87% of the total), 90 merit opinions (70% of the

2. Available at: http://www4.planalto.gov.br/legislacao

3. Available at: http://www.acessoainformacao.gov.br

total), and 112 legal opinions (87% of the total) were made available, either because there was no answer from the administration or because these opinions have not been written.[4]

The indicators used to assess the opinions are those officially established by Annex I of Decree 4,176/02 (2002). Annex I addresses 9 categories, encompassing a total of 131 items, as shown in the table (1).

TABLE 1 – CATEGORIES OF POLICY RULEMAKING (DECREE 4,176/02, ANNEX I, ITEMS)

Category	Topic	Items	Quantity
A	Identification and Situational Analysis of the Problem	1 to 1.7 and 7 to 7.2	11
B	Identification and Analysis of Possible Actions	2 to 2.3	11
C	Identification of the Initiative Competency	3 to 3.5	6
D	Analysis of the Legality of the Regulation	4 to 6.5	18
E	Analysis of the Content of the Regulation	8 to 8.5	9
F	Analysis of the Impact on Fundamental Rights	9 to 9.5	42
G	Analysis of the Public Interest	10 to 10.5	12
H	Analysis of Feasibility	11 to 11.6	16
I	Cost-Benefit Analysis	12 to 12.5	6

To assess the rulemaking quality of the sampled Decrees, the content of each ministerial (EM), merit (SAG), and legal (SAJ) opinion was checked with these items (indicators) listed in Annex I. The procedure consisted of a simple verification of compliance without any in-depth judgment on the quality of the analysis performed by the public manager or lawyers.

4. It was necessary to resort to administrative appeal bodies or even the court (writ of mandamus) to gain access to the information.

Then, verification results were quantified (0 to non-occurrence of the item and 1 to the occurrence). This quantification made comparative analysis straightforward.

After that, results were analyzed according to Hill and Lynn (2009), to distinguish between the structural, the managerial, and the cultural dimensions of the public administration. To do so, a qualitative analysis of the existing rules on policy rulemaking was combined with documental and interview data. This part of the analysis takes advantage of a previously made dataset of 66 interviews with top-ranked federal public managers and lawyers, produced by the Brazilian Institute for Applied Economic Research between the years 2013 and 2014 (IPEA 2014).

TABLE 2. SAMPLE OF RESPONDENTS

Role	Number	%
Advisors	7	10,6
Public Lawyers	24	36,3
Public managers (Director or Coordinator)	30	45,4
Public managers (Executive-Secretary)	5	7,5
TOTAL	66	100

Source: IPEA, 2014.

All interviews have been transcripted and received a code that prevents the identification of the interviewees. The excerpts of interest were selected, and their compilation provided evidence for the explanatory hypotheses, presented in accordance with the public administration dimensions of Hill and Lynn (2009).

4. RESULTS

The rates of compliance with ministerial (EM), legal (SAJ) and merit (SAG) opinions, according to the categories in Table (1) are summarized in table (3).

TABLE 3. AVERAGE PERCENTAGE OF OCCURRENCE (OF THE CATEGORIES) IN THE SAMPLE

Category	EM (%)	SAJ (%)	SAG (%)	Total (%)[a]
A	34,2	30,7	25,39	53,51
B	10,3	4,52	3,46	14,9
C	4,3	9,24	3,26	14,8
D	2,22	3,28	2,06	6,4
E	1,0	1,90	1,08	2,5
F	0,6	1,61	1,32	2,9
G	11,0	5,63	5,16	1,7
H	0,6	1,61	1,27	0,2
I	0,1	0,36	0,03	0,9
Total	0,47	4,50	3,22	8,77

[a] Total displays the result considering the occurrence of the items in at least one opinion (EM, SAG or SAJ)

The results evidence that, on average, the opinions are considering 8,7% of the items of better policy rulemaking required by Decree nº 4,176/2002. Although there is an occurrence of 53,5% in the category of “Situational Identification and Analysis of the Problem” (category A), the analysis of the content and legal risk of the regulation is around 6,4% and 2,5% (categories D and E), except for an analysis of the legal risk on fundamental rights (legal certainty, rights of freedom and equality), with an average rate of 1%.

The average occurrence of the categories related to the Regulatory Impact Analysis (RIA) is at or below 2% (categories G, H, I). The analysis has also shown that all the opinions described the objectives

sought with the policy regulation (100%), and the great majority also described: a. the reasons for the initiative (89%); b. the duty of the Union to take action (81%); c. the fact that the matter is subject to a Decree and not another legal act (70%); d. the body that must assume responsibility for the issue (65%).

However, results show that 53 (fifty-three) out of the 131 (one hundred and thirty-one) items assessed have not been addressed in any of the sampled opinions. This represents 40% of the total number of items aimed at ensuring the adoption of better regulatory practices within the federal executive branch of government. Among the neglected items are elementary legal aspects: a) efficacy (precision, degree of probability of attainment of the intended goal); b) effects on the legal order and targets already established; c) possibility of challenge in the Judiciary; d) imposition of fines and penalties; e) the conflicts of interest one can predict that the executor of the measures will be confronted with. Indeed, out of the 37 Decrees, only 2 presented an explanation of the possible costs and benefits of the policy regulation, and 3 discussed possible alternatives to deal with the public problem addressed by the policy regulation. In only one Decree opinion a possible legal risk (basic unity for legal risk analysis) was even mentioned.

Evidence supports a claim that the Brazilian federal government policy regulation process is lacking relevant technical information (policy evidence-based inputs produced by ex-ante/ex-post evaluation) needed to reach a better policy regulatory result. To explain this empirical result, I present the results of a qualitative data analysis, which will be categorized among three dimensions structural (legal), craft (managerial), and cultural, according to Hill and Lynn (2009).

4.1. STRUCTURAL DIMENSION (LEGAL FRAMEWORK)

According to Hill and Lynn (2009), "structure is the formal and lawful delegation of specific responsibilities to designated officials and organizations". The main features of the Brazilian policy rulemaking framework have been recently changed through the enactment of Decree n º 9.191/2017, which imposed modifications to Decree n º 4.176/2002 (in effect from 2002 to 2018). These structural changes were primarily compared by the analysis of six of these features: competency; structure; process; public consultation; sanction, veto, and other provisions; and indicators.

TABLE 4. GENERAL STRUCTURAL FEATURES COMPARED

Features	2002 and 2017 Decrees comparison results
competency	The new Decree fixed a perceptible change of competencies widening the prerogatives of the Civil Office of Presidency (art. 1/17). The Sub-office of Legal Affairs of the Presidency improved its competencies especially for coordinating the policy regulatory process between Presidency and Ministries (art. 27/17). The Sub-office of Government Policies Analysis and Monitoring of the Presidency maintained its competencies for analysing the political and technical merit of policies (art. 24/17). Publication of legislative proposals by the Civil Office is no longer compulsory (art. 55-56/02).
structure	About the structure of the legal act (Law, Decree, etc), there were minor changes in rules for numeration, structure of presentation, object of regulation, format, effect and modification. The new Decree made improvements in the formal structure of regulation acts (art. 2-25/17).
process	The rules proposed by Ministries may be electronically sent to Civil Office with an explanatory statement (art. 26-30/17). This document must contain the proposal of regulation, a legal opinion, a merit opinion, and complementary documents (art. 31-32/17).
public consultation	Adoption of public consultation is more regulated in the new Decree. According to it, the proposed regulation under public consultation must be sent to the Civil Office for previous analysis and forthcoming consultation (art. 40-43/17). The Civil office is now centralizing the public consultation for policy regulation proposals coming from all Ministries.
sanction, veto, and other provisions	Most articles concerning these features in the 2002 Decree have been maintained in the 2017 Decree. No substantive changes were made.
Indicators (checklist)	The new Decree contains a checklist of indicators that must be observed by the proponents of policy regulation (annex I/17). Only four items from the previous Decree have been revoked; thirty-eight new items have been added and nineteen sections, reorganized. New items concern cost analysis, legislative simplification, and results assessment.

Table (4) shows that little incremental changes have been made since the 2002 first framework was established. The inclusion of new items in the legal and merit opinions that should accompany the regulation proposal (sent by Ministries to the Presidency or initiated at the own Presidency)

emphasizes the analysis of costs (item 16), management simplification (item 17), administrative adaptation (item 18), and results from assessment (item 19). Moreover, table (5) shows that the Brazilian federal government has rules containing almost all the best regulatory international practices. Even though there is no obligation for a formal regulatory impact assessment (RIA), a cost-benefit analysis (CBA) or a public consultation, all these tools have already been legally established. It all has been available to proponents of policy regulation at least since 2002.

TABLE 5. NATIONAL RULES ON POLICY RULEMAKING GOVERNANCE

International Best Practices	Brazilian Regulation (applied to the Executive Branch of the Federal Government)	Regime
Public Transparency	Public access to information Law (Law nº 12.527/2011 & Decree nº 7.724/2012.)	Mandatory
Regulatory Impact Analysis	Decree nº 9.191/2017 (Art. 32, VI), Decree nº 10.411/20	Mandatory
Public Consultation	Decree nº 9.191/2017 (Chapter VI)	Optional
Legal Risk Assessment	Decree nº 9.191/2017 (Art. 31, II and III)	Optional
Anticorruption Practices	Anticorruption Law & Decree nº 9.203/2017 (Law nº 12.846/2013, Decree nº 8.420/2015, IN MP/CGU nº 1/16)	Mandatory
Fiscal & Budget Accountability	Fiscal Responsibility Law & Budget Law (Complementary Law nº 101/2000 & Law nº 4.320/1964)	Mandatory
Public Policy Evaluation	Interministerial Ordinance nº 102/2016, Decree nº 9.191/2017 (Annex - items 16 and 19), and Decree nº 9.203/2017	Optional

Therefore, under this structural dimension, failures in the policy rulemaking process cannot properly be attributed to the absence of legal standards for implementation. Deficiencies on the craft or cultural dimensions are probably more important to explain them.

4.2. CRAFT DIMENSION (MANAGERIAL FRAMEWORK)

According to Hill and Lynn (2009, p.5), “craft refers to public managers’ attempts to influence government performance through

the force of their personal efforts in goal setting, exemplary actions, leadership, and the like". Overall, the craft in the rulemaking process begins with the identification of a policy problem. At this initial stage, the corresponding technical area of the ministry formulates a technical note that starts the process. According to the procedure institutionalized by the Decree n º 4.176/2002, altered by Decree n º 9.191/2017, when a Presidential Decree or a Ministerial Ordinance is necessary, the document is sent to the Legal Consulting Department (CONJUR) for a legal opinion or, if the issue covers more than one ministry's competency, it is usual to promote Interministerial workgroups, coordinated by representatives of the Presidency Civil House Office (IPEA, 2014). All documentation is electronically processed through a system called SIDOF (System for the Generation and Processing of Official Documents). Two striking features of this process should be mention. First, legal opinions have no binding power over the public manager's decision. Second, public lawyers are not sanctioned in case of misleading legal guidance, except in case of a proven wilful error.[5] According to the managerial process of regulation, the following interview exerts are worthy to detail:

> *Each situation is different and totally depends on the person interested in the Ministry, and for us here it is frustrating because as we have no control*, we advise not to intervene [..] As people love to hold meetings, meetings are usually scheduled at the last minute *without sending previous material, without preparation. Usually, meeting participants do not know what is going to be discussed*, but they take place because there is a culture that you cannot go on playing without talking to other people, and so if I was at the meeting at least I saw it. *Only, although this procedurally included others, in practice you end up having meetings with very little content, with a lot of repetition of subjects, and this is the way how an interaction between Ministries usually ends up happening.* [..] it will depend a lot on the person, who is taking over and then, if there will be more meetings, who he will tell, with whom he will talk more, if he will try, someone will speak to the minister, but *without much homogeneity between one specific case and another* (IPEA, 2014, INTERVIEWEE 59, P. 6-7, AUTHOR'S EMPHASIS)

5. According to Brazilian Civil Code, article 184, Writ of mandamus 24.073/2002 and 24.584-1/2007, and Supreme Court Informative 475.

> My assessment is that a good part of the decisions here are after the content, *the decisions of the public administration in general are recovered with little content, after following a "formal process"* (IPEA, 2014, INTERVIEWEE 59, P.8, AUTHOR'S EMPHASIS).

All ministries ought to comply with national laws about public transparency, anti-corruption practices, and fiscal and budget accountability. The first feature is currently managed by the public transparency portal that centralizes citizens' requests for public information, as well as their answers. The second is currently under implementation by Normative Instruction MP/CGU nº1/2016, which gives a start for risk public management in the Brazilian federal government (2016). Under this feature, the inclusion of integrity risks into the rulemaking process has just been launched. Fiscal and budget accountability has been achieving the best managerial results with SIOP (*Sistema Integrado de Planejamento e Orçamento*), an electronic system for planning and budgeting that integrates the management of the entire federal government. Through this system, open data is available for monitoring policies, accessible data is available for ordinary citizens, and all budget and fiscal indicators are shown in a real-time panel. At first glance, thus, the crucial craft difficulties in policy rulemaking governance seem not to be related to these features.

On the other hand, the implementation of Regulatory Impact Analysis (RIA), public consultation, and public policy evaluation is still incipient in federal government policy rulemaking. The Brazilian federal executive branch of government does not have an integrated national policy evaluation system (or repository) with shared principles or practices. Nor does it have a law that obliges the evaluation of public policies or governmental programs. Each ministry is free to decide to evaluate, or not, its own policies and programs. For this reason, there is a huge inequality between the ministry's capacities to evaluate and incorporate its results into the decision-making process. Over time, the Ministries of Economy, Education, Health, and Social Development are the only ones that demonstrate improvement under this feature.

Just as there are no ex-post evaluation practices consolidated, there are also no ex-ante assessment practices established in Brazilian ministries. It means that, until now, regulatory impact analysis is almost unknown for public managers and lawyers. Some mentions of RIA were gathered just in a few interviews and for a limited number of cases. Until the recent publication of the "Guide for preparing RIA", mainly focused

on regulatory agencies, there were no guidelines for performing it in the Brazilian federal public administration (BRASIL, 2018).

> Interviewer: Is there any concern of the ministry with regulatory impact analysis?
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> Interviewee: No, *we leave that to [name of the regulatory agency]* (IPEA, 2014, INTERVIEWEE 64, P. 7, AUTHOR'S EMPHASIS).
>
> *Consultancies, [..] they need to have a better understanding of the state about what legal advice is. It is an AGU organ, it is true, within the ministry, but you have to be very careful because some public lawyers do not understand the current work that they have, they act a lot as internal control*, when here my attempt has always been to take them further into the government, in order to help in the formulation, in the understanding, in the policy design (IPEA, 2014, INTERVIEWEE 43, P. 8, AUTHOR'S EMPHASIS).

Since 1999, the occurrence of public policy consultation has constant growth rates in the Brazilian government. At first, according to a decentralized model, each ministry performed its own public consultations. This model has been replaced and consultation was centralized in the Presidency of the Republic. This important change, enacted by Decree nº 9.191/2017, established a regular procedure for public consultation, publication of its suggestions, and presentation of an explanatory statement of its results. More changes in the managerial procedures of policy rulemaking were also expected due to the improvements brought by Decree nº 9.203/2017 (Public Governance Decree).

4.3. CULTURAL DIMENSION

According to Hill and Lynn (2009, p.3), "culture encompasses the norms, values, and standards of conduct that provide meaning, purpose, and a source of motivation to individuals working with an organizational unit". From the interviews' analysis, we can identify that many difficulties imposed on the regulatory improvement of policies derive from cultural aspects. Excerpts from interviews 9, 59, and 67 summarize the argument.

> I think there is a growth in ethical thinking in organizations [..] *Increasingly, people do not want to get involved with things that do not generate results* (IPEA, 2014, Interviewee 9, p. 4-5, author's emphasis).

the bad thing about this whole story, I think is ... *the creation of a plutocracy, you know, of a lawyer who does the exact opposite, which is completely detached from its objective* [. .] there is a certain fear installed when you need to deal with themes, new or old, but that have TCU, CGU, involved. [..] I also realize that what is happening, is a sophistication of mediocrity (IPEA, 2014, INTERVIEWEE 9, P. 4-5, AUTHOR'S EMPHASIS).

lawyers are difficult, because in their mind, everything is a validation process, [..] if I say something, or write, or ask for an opinion on something, a rule, government proposal, for them it is always a validation process: "*you can, you cannot*". It is never a process of reasoning, which is the best for the institution, and then *it is difficult at times to get rid this small power that legal advisers cumulate*[..] This is a problem because it does not deal with strategy (IPEA, 2014, INTERVIEWEE 9, P. 8, AUTHOR'S EMPHASIS).

the *principle of mistrust is the great reality in our relationship*... the men of law are suspicious of the managers of public policies and the managers of public policies are suspicious of the goodwill, or the intelligence, of the lawyers (IPEA, 2014, INTERVIEWEE 9, P.9, AUTHOR'S EMPHASIS).

there is a distrust on the side of those who formulate the public policy, that the laws are not adequate to the objectives of policies, as if the rules were not good for policies, and then there is a mismatch [..] the natural order that all managers were programmed with is: "*look, don't provoke the legal staff, he can say no, and it's all over*" (IPEA, 2014, INTERVIEWEE 9, P.9, AUTHOR'S EMPHASIS).

they [legal advisers] do *a formal analysis to get rid of the process* (IPEA, 2014, INTERVIEWEE 9, P.9, AUTHOR'S EMPHASIS).

the kaleidoscope of choices that the public manager has is not small, despite what people say, *the problem is that there is an asymmetry of information between lawyers and politicians*, men of politics know little about the legal possibilities that are available and that is why they end up making mistakes. So, they go beyond the possibilities, they choose the anti-legal, illegal, unconstitutional alternatives, or on the contrary, *they can even choose a legal alternative but fail to choose something much better for lack of ability to look at the entire*

set of possibilities (IPEA, 2014, INTERVIEWEE 9, P.9, AUTHOR'S EMPHASIS).

And then *I think the trend in law is much more legalistic [..] This is more about legality than to actually reach a final goal that was to solve a policy problem, right. It is not that you are going to commit a malfeasance, but it is suddenly much more conservative than it needs to be [..] People who are more and more conservative in their decisions*, more rigid even to not want to take risks (IPEA, 2014, INTERVIEWEE 59, P.7, AUTHOR'S EMPHASIS).

I think there is a huge space for optimization of operation as a major concern in terms of results and data. But it involves breaking the procedural culture quite a bit, and it involves creating skills, competencies that you often do not find in public administration and [...] I think that in very, very few meetings someone mentioned a data. *Usually, when someone wants to mention that something is going to work, or not, they draw from personal experience and use a lot of adjectives, but almost all high-level political decisions, and here thinking [name of ministry], are made without having the concrete data that would illustrate the real situation* (IPEA, 2014, INTERVIEWEE 59, P.3, AUTHOR'S EMPHASIS).

I think doing *this is the result of a culture that values the procedure very much, now that does not work if you really want to solve the problem* (IPEA, 2014, INTERVIEWEE 59, P. 5, AUTHOR'S EMPHASIS).

nobody wants to risk tampering with this system because politically it can be problematic. (IPEA, 2014, INTERVIEWEE 59, P.7, AUTHOR'S EMPHASIS)

I think about the role of the lawyer here [..] *He doesn't make the final decision on whether to buy A or B, but he's the guy who will say: "Look, you have the risks here, you have to consider that if you do this you will have such and such expenses and will have such and such consequences in the future"*. I think that he should be the person who helps guiding managers, but he should never be the person who pretends to be a law enforcement officer, or to fight with the manager, saying: "This cannot be!". *He must say what the legal difficulties are and point out solutions. And indicate to the manager what are the risks associated with each solution*. (IPEA, 2014, INTERVIEWEE 59, P. 5, AUTHOR'S EMPHASIS)

> *This culture that the law can be reformed is also not an obvious thing inside public administration.* "Ah, this can, this cannot", no, do you want to do this? As it is, it can't, but if we change it, in another way, it can [..] *I look for alternatives because legal advice refused to do this role*. (IPEA, 2014, INTERVIEWEE 67, P. 17)
>
> It is usually produced in the "Finalistic Secretariat", then sent to CONJUR [legal office], *then CONJUR gives their okay and it goes straight to the minister's office*. (IPEA, 2014, Interviewee 67, p. 7)

Considering this evidence, both craft and cultural dimensions seem to be in the center of the Brazilian better regulation efforts. The interviewee's opinion converged about: a) a lack of technical perspective and routine of procedures, due to an unbalanced prevalence of the political dimension in policy decision making and subsequent rulemaking; b) extremely high public management risk aversion and lack of leadership, caused by internal and external controls perceived as disproportionate by public managers (sometimes deepened by the lack of capacities of some personnel inside ministries); c) an absence of entrepreneurial approach, based on a legal and managerial risk assessment, because of a procedural and restricted perception of legality (less committed with a public value achievement); d) a misguided attempt to use legal opinions as a shield against possible sanctions imposed by the internal and external control bodies over public management personnel.

It is also important to mention that these results are convergent with previous studies that emphasized the political and administrative limits of the Brazilian regulatory reform. Apparently, similar limitations on advancing the quality of regulation and policy rulemaking seem to occur both in regulatory agencies and the ministerial structure (OECD, 2008B; PECI; SOBRAL, 2011). Above all, these adverse practices have proved to be not only detrimental to policy rulemaking improvement but extremely rooted in the perception of high-ranked Brazilian bureaucrats.

5. CONCLUSION

This research assessed the adoption of better policy regulation practices within the Brazilian federal executive branch of government. The results show that despite a recent improvement in the legal framework, responsible for authorizing public managers to adopt most of the policy rulemaking best practices, adversarial managerial practices, and cultural values are imposing difficulties for its advancement.

First, a significant amount of information that is relevant to policy regulation improvement, as determined by Decree n º 4.176/2002, is simply not mentioned in the ministerial, legal, or merit opinions. Crucial information on potential effects on the legal order, the possibility of courthouse challenges, and the eventual impact on fundamental rights, for example, were neglected in all sampled opinions. These data indicate a severe risk in terms of the technical quality of the governmental decision-making process within the Presidency and its ministries.

Second, an analysis of merit and the legal risk appears in less than 15% of the sample, evidencing the reduced importance given to this information inside the governmental decision-making process on public policies – which paves the way for the hypothesis that the main criteria for governmental decision-making are not evidence-based, but exclusively political (increasing risks of political corruption). This may result in inefficiency of governmental decisions on public policies and limits the quality of government solutions for public problems (due to loss of rationality on governmental decisions).

Third, many opinions have not even been made available (or even been formulated by proponents of policy regulation). Even the appeal to superior instances was insufficient to grant access to information guaranteed by the recently enacted Brazilian law on access to public information. On this topic, public transparency is still a challenge. Moreover, many sampled Decrees did not have any ministerial, legal, or merit opinion associated with them, in a clear violation of the motivation principle of Brazilian public administration. Both transparency and motivation in the policy rulemaking process are fundamental principles of a democratic regime that still need to be improved in Brazil.

Finally, until Law n º 13.874/2019 (Declaration of Economic Freedom Rights) and Decree 10411/20, there was no rule that imposed on governmental proponents the obligation of regulatory impact analysis (or even *ex-post* policy evaluation), cost-benefit analysis, or risk assessment. Hence, this lack of legal enforcement gave the federal executive branch a great discretionary power over policy regulation. However, even under this new legal framework, evidence highlights that there is little hope that a real change would occur in the policy rulemaking process due to managerial and cultural customary institutional trajectories. A lot of managerial efforts are still needed to turn the law into a tangible result for improving the Brazilian policy rulemaking decision-making process within the federal executive branch of government.

Will policy decision be subject to the best scientific evidence? Will public managers be rewarded (not punished) for managing risks to address relevant societal problems? Will policies and programs be periodically evaluated and adjusted accordingly? This study does not answer these relevant questions, with regard to the main assumptions of the better regulation practices, as it was limited to verifying only the compliance of the opinions with the established legal criteria and no evaluation was carried out on the quality of these opinions or the policy decision-making process itself. Furthermore, our explanatory hypothesis is formulated from an interview database that was not built to assess these specific results. Consequently, all these relevant questions have yet to be answered by forthcoming studies that will test our hypothesis in the light of new evidence on the current policymaking process and its future reforms.

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